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No. 89-700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP,
Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,
et al.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Alan Shurberg, a long-time resident of Hartford, Connecticut, was the sole principal of Shurberg Broadcasting of Hartford, Inc. That corporation applied to the Federal Communications Commission ("FCC") in 1983 for authority to construct a broadcast station on Channel 18 in Hartford and initially prosecuted the appeal arising from the FCC's action relative to that application. Mr. Shurberg has, since February, 1989 and pursuant to the FCC's rules, prosecuted the application and the appeal as a sole proprietorship, *i.e.*, Alan Shurberg d/b/a Shurberg Broadcasting of Hartford. Mr. Shurberg, his sole proprietorship, and his corporation are referred to collectively as "Shurberg" herein.

Petitioner Astroline Communications Company Limited Partnership Debtor in Possession ("Astroline") is a Massachusetts Limited Partnership which has been in Chapter 11 bankruptcy proceedings in United States Bankruptcy Court for the District of Connecticut (Case No. 2-88-01124) since December 1988.

The Federal Communications Commission is an independent agency charged with regulating the radio airwaves in the United States.

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COUNTERSTATEMENT OF THE CASE

Respondent Shurberg Broadcasting of Hartford opposes the petition for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. There is no reason for granting the petition and, in fact, Petitioner Astroline Communications Company Limited Partnership Debtor-in-Possession ("Astroline") does not in any event have the requisite standing to raise the issues which it seeks to present to this Court. The Petition contains no reference to *any* of the considerations for granting

certiorari set forth in Supreme Court Rule 17.1. Nor could Astroline demonstrate the presence of any of those considerations: notwithstanding Astroline's self-serving, materially incomplete, presentation to this Court, the decision below was clearly correct and in accord with decisions of this Court and the court below.

This case involves a single policy -- the minority distress sale policy ("distress sale policy") -- of the Federal Communications Commission ("FCC"). *See Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 (1978), *clarified*, 44 Rad. Reg. 2d (P&F) 479 (1978) (collectively, "*1978 Policy Statement*"); *Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982) ("*1982 Policy Statement*"). That policy was adopted, without formal rule making proceedings or the development of any supporting administrative record, in 1978. *See 1978 Policy Statement, supra; Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986) ("*1986 Notice of Inquiry*"). The policy was available *only* to members of various groups generally defined by the FCC as "minorities". It therefore *completely* excluded non-minorities such as Alan Shurberg, Shurberg's sole principal, strictly on the basis of race. The constitutionality of this race-based exclusory policy had not been challenged prior to this case.

Pursuant to well-established, statutorily-mandated policies, in 1983 Shurberg filed an application with the FCC seeking the facilities of Station WHCT-TV, Hartford, Connecticut. At that time WHCT-TV was licensed to

Faith Center, Inc. ("Faith Center"), and Shurberg was seeking the opportunity to compete for the license in a comparative renewal proceeding. [1] Despite Shurberg's best efforts, the FCC took no immediate action on Shurberg's application and, seven months after that application was filed, Faith Center sought to invoke the minority distress sale policy to avoid a comparative proceeding by selling the station to Astroline.

Shurberg opposed the Faith Center/Astroline distress sale application, arguing *inter alia* that: (1) approval of the proposed distress sale and rejection of Shurberg's application would be inconsistent with the Communications Act and the FCC's own express policies; (2) Astroline was not in fact a "minority-controlled" entity eligible to take advantage of the distress sale policy; and (3) that policy discriminated against non-minorities unconstitutionally on the basis of their race. The FCC rejected all of Shurberg's arguments and granted distress sale relief to Faith Center and Astroline.

Shurberg appealed that decision to the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), preserving each of the arguments raised before the agency. Before the court below, the FCC initially

[1] The comparative renewal process is mandated by the licensing provisions of the Communications Act of 1934, as amended ("Communications Act"), 47 U.S.C. §§1 *et seq.* *See, e.g., Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945); *Central Florida Enterprises v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). Shurberg sought comparative status equivalent to that which the FCC had granted similarly-situated parties in *Faith Center, Inc.*, 89 F.C.C.2d 1054 (1982).

defended the constitutionality of the distress sale policy. However, in September, 1986 – while the instant case was still pending – the FCC advised the full D.C. Circuit, sitting *en banc*, that, in light of intervening decisions of this Court in the area of reverse discrimination, the FCC had reviewed its minority ownership policies and determined that no adequate record had been compiled to support the constitutionality of those policies. Specifically, the FCC advised the court that

> First, no record has been established demonstrating that a race- or gender-based preference scheme to increase minority and female ownership is essential to achieving th[e] objective [of expanding diversity of programming]. . . . Second, no record has been established on which to base an assumption that a nexus exists between an owner's race or gender and program diversity.

Brief of FCC on rehearing *en banc* in *Steele v. FCC*, No. 84-1176 (D.C. Cir.) (September 12, 1986), at 18. In sum, the FCC advised the full D.C. Circuit in *Steele* that

> The Commission has closely examined the Commission's preference scheme . . . and concluded that it fails to pass constitutional muster as a tool to enhance diversity. . . .

Id.

The FCC restated that view with particular respect to the distress sale policy both to the panel below in the instant case, *see, e.g.*, Petitioner's Appendix at 11a, and in

its *1986 Notice of Inquiry, supra*. Thus, as of December, 1986, the FCC's position was that no record had theretofore been developed adequate to support the constitutionality of the policy. [2] The FCC thus effectively conceded that the distress sale policy, as it was in effect when applied in this case in 1984, was unconstitutional. Not surprisingly, the court below similarly – and correctly – found the distress sale policy as applied in this case to be unconstitutional, without reaching Shurberg's non-constitutional claims or its arguments concerning Astroline's apparent non-minority nature.

In sum, the decision below was consistent not only with the decisions of this Court, but also with the views of the agency which had itself developed the policy in question. This case clearly does not merit this Court's time or attention, and the Petition should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

At no point in its lengthy Petition does Astroline refer to any of the reasons – clearly set forth in this Court's own Rules – for which certiorari might be granted. This is understandable, for none of those reasons is applicable to this case: the decision below is not in conflict with any

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[2] Shockingly, in its Petition Astroline fails to mention that the agency which promulgated the policy under review itself effectively conceded the unconstitutionality of that policy. The FCC has not sought review by this Court of the decision below, nor did it file a timely brief in support of Astroline's Petition. *See* Supreme Court Rule 19.6.

other court decision, is completely consistent with applicable decisions of this Court, and involves but a single, very limited policy of the FCC. *See* Supreme Court Rule 17.1. Indeed, Astroline cannot even legitimately claim that it has standing to challenge the constitutional conclusion of the court below.

I.

ASTROLINE IS NOT A MINORITY-CONTROLLED ENTITY WITH STANDING TO SEEK REVERSAL OF THE DECISION BELOW ON CONSTITUTIONAL GROUNDS.

This Court's "prudential standing rule" bars litigants from "asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth v. Seldin*, 422 U.S. 490, 509 (1975). The question of standing goes to the Court's jurisdiction, *see Flast v. Cohen*, 392 U.S. 83, 94-101 (1968), and must be considered as a threshold matter. [3]

Astroline's Petition is premised on the notion that the distress sale policy was an appropriate mechanism for the advancement of the interests of "minority" group members. Astroline's claim to standing thus appears to be based on the notion that Astroline is itself a minority-controlled entity adversely affected by the determination below that the distress sale policy is unconstitutional reverse

[3] This is true even where the lower court(s) passed over without comment questions possibly affecting standing. *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

discrimination. But contrary to Astroline's assertions, the available record demonstrates that Astroline is not, in fact, a minority-controlled entity.

Astroline is a limited partnership supposedly controlled by Richard Ramirez, a supposedly Hispanic individual. [4] Mr. Ramirez' supposed controlling position is the sole basis for Astroline's claim of being a "minority-controlled" entity. But Astroline's own records, submitted to the Secretary of Commonwealth of Massachusetts (the state in which Astroline was formed) reveal that, of the total of more than $24,000,000 in capital contributions made by Astroline's various partners, Mr. Ramirez contributed a total of $210. That is, Mr. Ramirez' capital contribution represents *less* than one one-thousandth of one percent (0.001%) of Astroline's capital. Moreover, Astroline's partnership agreement did not provide for non-

[4] Astroline asserted simply that Mr. Ramirez is Hispanic; the FCC accepted that assertion without inquiring into the basis for it. Astroline has not claimed that Mr. Ramirez has ever been the victim of discrimination. *See* Concurring Opinion of Judge Silberman, Petitioner's Appendix at 31a (" [T]here was no procedural mechanism that would allow Shurberg . . . to prompt an inquiry into the economic status or the source of any disadvantage of Ramirez or his forebearers, nor did the FCC undertake any such investigation on its own initiative.").

capital contributions (such as "sweat equity"). [5]

In view of the dramatic disparity between the negligible actual contribution by Mr. Ramirez, on the one hand, and Astroline's claim of minority control, on the other, that claim cannot legitimately be credited unless the Court is willing to hold, as a matter of law, that an entity may be deemed to be "minority-controlled", for constitutional purposes, solely on the basis of a minority person's investment of less than one one-thousandth of one percent (*i.e.*, less than one one hundred thousandth) of the entity's capital. [6]

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[5] Shurberg has consistently argued, before the court below and the FCC, that Astroline is not a bona fide "minority-controlled" entity. The FCC rejected Shurberg's arguments and the court below did not have occasion to address them. At no time has Astroline disputed Shurberg's assertions concerning the *de minimis* nature of Mr. Ramirez' contribution. Since late 1988, Astroline has been the subject of an on-going bankruptcy proceeding. In that proceeding, further evidence has been adduced by the creditors tending to confirm Shurberg's long-held position that Mr. Ramirez did not in fact wield any control over Astroline's affairs. While that information has been presented to the FCC for its consideration, it is not part of the record below and is not relied on here. That information would have to be considered, however, before any credence could be given to Astroline's bogus claim of minority control.

[6] Other similarly suspect legal assumptions would also have to be made before Astroline could be deemed to have standing here. For example, Astroline's "minority control" is based solely on its claims concerning Mr. Ramirez' interest. But Astroline has never claimed that Mr. Ramirez owns more than a 21% equity interest in Astroline. Thus, even if this Court were inclined to overlook Mr. Ramirez' non-contribution, it would still have to consider, as a threshold matter, whether an entity may be deemed to be "minority-controlled", for
(continued...)

But if Astroline is not minority-controlled, it is not eligible to take advantage of the distress sale policy even if that policy were deemed, *arguendo*, to be constitutional. Thus, Astroline has no standing to challenge the decision below because, in order to do so, Astroline must assert not its own interests, but merely the interests of a class (*i.e.*, minority groups or minority individuals) of which Astroline is not properly a member. Since Astroline therefore cannot properly assert standing to raise the issues discussed in its Petition, that Petition can and should be summarily rejected.

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[6](...continued)
constitutional purposes, when no more than 21% of its equity is held by supposed minorities. Further, the Court would have to consider whether any claim to racially disparate treatment which a minority individual may have is transferrable to a limited partnership in which that individual owns, at most, only 21% of the equity. Additionally, according "minority" status to Astroline while it is a debtor-in-possession appears to be inconsistent with the limited, trustee role assigned to that position. *See* 11 U.S.C. §§704, 1107. How, after all, can a trustee acting on behalf of creditors be deemed a "minority" free to provide "minority programing" (whatever that might be)? Rejection of Astroline's Petition on the basis of Mr. Ramirez' non-contribution would obviate consideration of these additional questions.

II.

THE DISTRESS SALE POLICY IS DISTINCT FROM THE COMPARATIVE PREFERENCE POLICY AND THE DECISION BELOW IS THUS NOT INCONSISTENT WITH OTHER DECISIONS.

As is apparent from the initial "Question Presented" in Astroline's Petition, Astroline is not seeking certiorari on the basis of any conflict between the decision below and any other decision of any other court. Rather, Astroline is merely seeking another opportunity to argue that the distress sale policy is constitutional. That effort, however, is unavailing.

Astroline does seem to suggest that two D.C. Circuit decisions affirming the FCC's comparative preference policy for minorities may support Astroline's position before this Court. See Petition at 11, 22-23, citing *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985) and *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *petition for cert. filed sub nom. Metro Broadcasting Inc. v. FCC*, 58 U.S.L.W. 3242 (U.S. Sept. 18, 1989) (No. 89-453). But in advancing that suggestion, Astroline fails to point out that the comparative preference policy at issue in those cases is clearly distinct from the distress sale policy.

The FCC's comparative preference policy does not exclude non-minorities from consideration. That policy applies to the FCC's consideration of mutually exclusive applications for construction permits for new broadcast

stations. In comparing the qualifications of competing applicants, the FCC awards qualitative enhancement credit to applicants whose principals include minority individuals committed to participating in the management of the proposed station. *E.g., Radio Jonesboro, Inc.*, 100 F.C.C.2d 941 (1985). However, such enhancement credit is but one comparative factor considered in the overall comparative analysis. Other enhancement credits -- totally unrelated to minority ownership -- are awarded for, *e.g.*, local residence, involvement in local activities, and past broadcast experience. *E.g., Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965); *Radio Jonesboro, Inc., supra* (local residence and minority ownership held to have equal significance in comparative analysis). Thus, the minority comparative preference policy does not exclude non-minorities and does not even provide minorities with any necessarily dispositive advantage. Rather, that policy merely permits the FCC to consider racial status as one of a number of factors in the licensing process. [7]

By contrast, the distress sale policy is available only to minorities. As is demonstrated by this very case, non-minorities simply need not apply.

Moreover, since the comparative preference policy is part of the comparative licensing process, claims of minority ownership and control are subject to close scrutiny and adversarial challenge in the crucible of the

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[7] Shurberg takes no position here on the constitutionality of the comparative preference policy, although Shurberg does note that serious questions have been raised about certain of the assumptions underlying that policy. *See Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *reh'g en banc granted and opinion vacated* (October 31, 1985).

administrative comparative hearing process. That is, competing applicants are afforded full opportunity, through discovery and cross-examination, to demonstrate that a supposedly "minority-controlled" applicant is, in fact, nothing more than a sham. *See, e.g., Capital City Community Interests, Inc.*, 2 FCC Rcd 1984, 1987 (Rev. Bd. 1987). Competing applicants also have the opportunity to explore whether any minority applicant has been the victim of any past discrimination which might entitle that individual to special remedial consideration.

By contrast, as illustrated in this case, the distress sale policy provides no such opportunities. Instead, the FCC appears ready and willing to accept without question virtually any claim of "minority control". And, when an opposing party such as Shurberg manages, despite the lack of discovery, to present strong documentary evidence undermining a claim of minority control, the FCC simply ignores it. [8] Similarly, the FCC totally ignored Shurberg's

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[8] *See* n.4, *supra*. At Page 19 of its Petition, Astroline claims that "the FCC is alert to ferret out distress sale purchasers who are merely minority 'fronts'." This assertion is especially surprising coming from Astroline in the particular context of this case. As discussed above, in order to credit Astroline's own claim of "minority-control", one would have to believe that non-minority individuals who had no personal familiarity with Mr. Ramirez were nevertheless willing to enter into a partnership with him, make more than $24,000,000 in capital contributions to that partnership (as opposed to Mr. Ramirez' mere $210 contribution), and give Mr. Ramirez complete and absolute control of that partnership. Such a scenario does not comport with ordinary experience or normal business judgment. And yet the FCC simply rubber-stamped Astroline's claim, belying Astroline's claims to this Court concerning the agency's supposed vigilance.

observation that Astroline had not, in any event, shown that it had been the victim of past discrimination.

In light of these major distinctions between the comparative preference policy and the distress sale policy, it is clear that any decisions concerning the former are irrelevant to questions presented concerning the latter. Indeed, Judge Silberman, a member of the majority below, specifically recognized that the two policies are distinguishable. Petitioner's Appendix at 13a.

It is equally clear that the decision below is consistent with this Court's recent decisions in the area of reverse discrimination. While those decisions [9] have given rise to some questions concerning their ultimate reach, the decision below falls well within the readily discernible metes and bounds of those cases. This Court has indicated that, while race-based governmental policies may be permissible in some contexts, any such policy must be remedial in nature and narrowly tailored to address compelling governmental interests in the least constitutionally objectionable manner. *See Croson*. It is clear that the majority below considered in detail and properly applied the standards of this Court's cases in that regard. Certiorari is thus neither necessary nor appropriate.

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[9] The four primary reverse discrimination cases of this Court are: *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); and *City of Richmond v. J.A. Croson Co. ("Croson")*, 109 S.Ct. 706 (1989).

III.

NO OTHER BASIS FOR REVIEW OF THE DECISION BELOW EXISTS.

Astroline argues that the decision below "disregard[ed]" the "express approval" of the distress sale policy by Congress. Petition at i. Astroline's discussion on that point, however, omits a number of important details which undermine its argument.

The legislative record cited by Astroline consists of three particular actions which are said by Astroline to demonstrate "express" Congressional approval of the distress sale policy. The first is the Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087. That act, however, did not codify or otherwise "express[ly] approve" the distress sale policy. Rather, it merely authorized the FCC to utilize a lottery in place of the comparative hearing process. Congress did include in the act language requiring the maintenance, in the initial licensing process, of a minority preference mechanism. The act itself did not, however, address the distress sale policy.

The Conference Committee Report accompanying the act did include a passing reference to the distress sale policy. H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 44 (1982). That passing reference in a committee report could hardly be deemed to represent "express approval", as Astroline claims. The FCC itself acknowledged, in its *en banc* brief in *Steele*, *supra*, and in its *1986 Notice of Inquiry*, *supra*, that the extremely limited remarks in the report could not, by themselves, provide the constitutional

support necessary for a race-based governmental scheme such as the distress sale policy.

But even if it did constitute, *arguendo*, some measure of "approval", however indirect, the distress sale policy mentioned in the Conference Committee Report was not the same policy which was applied below. Shortly after the passage of the Communications Amendment Act of 1982, the FCC modified its distress sale policy. The policy at the time the Act was passed provided that, in order to be eligible for distress sale treatment, a minority entity would have to have an ownership structure consisting of at least 50% minorities. *See 1978 Policy Statement*, *supra*. Thereafter, the FCC amended the policy to lower that requirement to 20%. *See 1982 Policy Statement*, *supra*. Since Astroline's claimed minority ownership consisted of only 21%, it is clear that Astroline was not seeking, and could not have sought, to take advantage of the policy mentioned in passing by the Conference Committee. Therefore, it is inaccurate to claim that the extremely limited and indirect 1982 Committee reference to a different distress sale policy constituted "express approval" of the policy at issue here.

The only other instances of alleged Congressional approval cited by Astroline appear not in the Communications Act or in any other codification, but rather in the 1987 appropriations act for the entire Federal government. Pub. L. No. 100-202, 101 Stat. 1329 (1987). That is, Congress did not choose to include the distress sale policy in the Communications Act. Rather, in one sentence in the voluminous Federal budget bill, Congress merely forbade the FCC from reconsidering or

modifying its minority ownership policies, including the distress sale policy. In relying on this action, Astroline neglects to mention several points:

- The 1987 budget bill was passed some three years after the FCC's action in this case. As Judge Silberman noted in his opinion below, "Congress cannot, after the fact, change a law that had effect three years earlier." Petitioner's Appendix at 51a.

- The 1987 budget bill is not based on any specific record and includes no detailed findings. Instead, it merely cites the 1982 Committee report which, as described above, was itself inapposite to the question presented in this case and (even in the FCC's view, at least in 1986) inadequate for the purposes cited by Astroline.

- Press reports, published shortly after the 1987 appropriations act was passed, revealed that the source of the reference to the minority ownership policies in that bill was none other than Astroline. Representatives of Astroline were quoted as having undertaken a substantial lobbying effort in order specifically to assist Astroline in its litigation of this case. As Judge Silberman observed, Congressional interference in on-going judicial proceedings raises serious constitutional questions relating to the separation of powers. See Petitioner's Appendix at 50a. Moreover, Shurberg questions the propriety of a litigant attempting, through the legislative process, to alter retrospectively the outcome of on-going litigation.

See Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966).

While Astroline makes much of language from *Croson* concerning the expansive powers of Congress, Astroline fails to note that that discussion (which does not appear in a portion of Justice O'Connor's opinion comprising the Court's opinion) of those powers occurs in the context of § 5 of the Fourteenth Amendment. *See Croson*, 109 S.Ct. at 718. That language must thus be viewed as relating to Congress' power to remedy past instances of discrimination. But here it has never even been alleged, much less proven, that the FCC has ever discriminated in its broadcast licensing processes or that Astroline has ever been the victim of any discrimination. In fact, throughout this case the FCC has specifically and repeatedly stated that the distress sale policy was not adopted to remedy any discrimination. *See, e.g.*, Brief of FCC below, filed May 15, 1985, at SA-2 ("The minority ownership policies do not constitute an affirmative action place designed to provide remedies to individuals for the effects of past discrimination."). Astroline's reliance on that language from *Croson* is thus misplaced.

Shurberg concedes that the Constitution does accord Congress substantial authority. However, that authority is specifically limited by the Constitution itself, including, *inter alia*, the Fifth and Fourteenth Amendments. With those limitations specifically in mind, the court below carefully considered Astroline's claims about the effect of the Congressional actions cited in its Petition, and the court below correctly concluded that Astroline's claims had

no merit. No review of that decision by this Court is necessary.

CONCLUSION

Contrary to the impression which Astroline attempts to create, the decision below is an exceptionally narrow one, consisting of only four sentences and relating to only one limited policy of the FCC. That decision thus has extremely limited precedential effect. The separate concurring opinions of Judges Silberman and MacKinnon reflect that careful and detailed consideration was given to all relevant arguments and authorities. Astroline has demonstrated no basis at all for review of the decision below by this Court, and no such basis exists.

For the reasons stated, the Petition should be denied.

Respectfully submitted.

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